

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2000 Session

**FORREST L. HOLDER v. TERMINEX INTERNATIONAL COMPANY,
L.P., ET AL.**

**Direct Appeal from the Circuit Court for Shelby County
No. 93350-6 T.D. George Brown, Judge**

No. W1999-01040-WC-R3-CV - Mailed April 3, 2001; Filed June 5, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(1999) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant presents the following issues for review: (1) Whether the trial court correctly found that Mr. Holder did not give notice of a job injury or adequately disclose his condition; (2) Whether Mr. Holder permanently aggravated an underlying or pre-existing condition; (3) Whether Mr. Holder sustained any permanent partial disability as a result of his employment. After a review of the entire record, briefs of the parties and applicable law, we affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

ROBERT L. CHILDERS, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WIL V. DORAN, SP. J., joined.

W. Timothy Hayes, Jr., Memphis, Tennessee, for the appellant, Forrest L. Holder.

Jere B. Fones, Memphis, Tennessee, for the appellee, Terminex International Company, L.P., and Zurich Insurance Company

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

Plaintiff, Forrest L. Holder, filed his Complaint on March 5, 1998 alleging that he was injured as a result of being exposed to chemicals while employed by Terminex. This case was tried on September 14, 1999 and resulted in the trial court finding in favor of the defendant. The trial court held that plaintiff did not adequately disclose his condition; did not give timely notice of his alleged injury; and failed to show that he suffered a permanent injury or aggravation of a pre-existing condition as a result of his employment with Terminex. Plaintiff appeals the decision of the trial court. For the reasons discussed below, we affirm.

FACTS

At the time of the trial, plaintiff was a fifty-one year old white male with a GED. His work history includes truck driving, station porter, nightclub worker, artist and handy man.

Plaintiff began his employment with Terminex in July 1995 at the age of 47 as a service technician. Prior to this employment, plaintiff had complained of chest pains, shortness of breath, and a bad cough. Plaintiff was referred by his family physician to Dr. Joseph Blythe, a pulmonologist. After examination and a pulmonary function test, Dr. Blythe diagnosed plaintiff with chronic obstructive pulmonary disease (hereinafter referred to as COPD).

On January 30, 1997, during the last six months of his employment with Terminex, plaintiff again complained of chest pains and shortness of breath. Plaintiff sought medical treatment from Dr. Roger LaBonte. Plaintiff made Dr. LaBonte aware of the fact that he worked around chemicals and as a result Dr. LaBonte ordered both heart and lung tests. Upon review of the tests, Dr. LaBonte found overinflation of the lungs due to emphysema or COPD. According to Dr. Morris Gavant, who reviewed the tests as well, there was no evidence of nodules that would indicate damage from long-term exposure to silica.

On July 16, 1997, plaintiff took a leave of absence from Terminex to have hemorrhoid surgery. While he was on leave of absence he began to experience pain in his lungs. He was referred to Dr. Johnny Belenchia who examined plaintiff on September 12, 1997. After examination and a chest x-ray, Dr. Belenchia diagnosed plaintiff with emphysema. Dr. Belenchia's opinion was that the plaintiff's x-ray showed ground glass in his lungs that Dr. Belenchia believed was due to exposure to chemicals at work. Dr. Belenchia further stated that medical literature has shown that inhalation of powder based chemicals, especially silica based chemicals, can create a problem or add to the worsening of the condition. Subsequent to this diagnosis plaintiff did not return to work.

ANALYSIS

The trial court, after hearing testimony and weighing the evidence, found the plaintiff's credibility to be lacking. Considerable deference must be given to the trial court's finding of fact, especially where issues of credibility are involved. *Collins v. Howmet*, 970 S.W.2d 941, 943 (Tenn. 1998). Review of the trial court's decision requires a determination of whether the preponderance of the evidence favors the trial court's judgment. The decision of the trial court will be upheld unless

upon review it is determined that the evidence preponderates against the trial court's judgment. *Painter v. Toyo Kogyo of Japan*, 682 S.W.2d 944, 951 (Tenn. Ct. App. 1984). We must give the trial judge's findings regarding the weight and credibility of any oral testimony considerable deference. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992).

In this case, the trial court found that plaintiff did not adequately disclose his physical condition to his employer at the time of his employment. The trial court also found that, except for plaintiff's witness Dr. Belenchia, there was no evidence in the medical proof that plaintiff sustained a permanent aggravation of his pre-existing condition. Dr. Belenchia did not use any diagnostic tests to diagnose plaintiff. He simply relied on a chest x-ray. In *Sweat v. Superior Industries*, 966 S.W.2d 31, 32 (Tenn. 1998), we held that, "the pre-existing condition must be 'advanced' or there must be an 'anatomical change' in the pre-existing condition or the employment must cause 'an actual progression . . . of the underlying disease'."

After review of the trial court's findings, the briefs and oral argument submitted by the parties, we find that evidence does not preponderate against the judgment of the trial court. A plaintiff in a workers' compensation suit has the burden of proving causation and permanency of his injury by a preponderance of the evidence. *Roark v. Liberty Mutual Insurance Co.*, 793 S.W.2d 932, 934 (Tenn. 1990). We affirm the trial court's determination that plaintiff did not meet this burden. Costs are assessed to the plaintiff.

ROBERT L. CHILDERS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2000

**FORREST L. HOLDER v. TERMINEX INTERNATIONAL COMPANY,
L. P., et al.**

**Circuit Court for Shelby County
No. 93350-6 T.D.**

No. W1999-01040-WC-R3-CV - Filed June 5, 2001

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Forrest L. Holder, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM